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Avoiding E-Discovery Accidents & Responding to Inevitable Emergencies: A Perspective from the Antitrust Division

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[1] The views expressed in this paper are my own and do not necessarily represent the views of the Antitrust Division or the Department of Justice.

The Division has filed and litigated an unprecedented number of cases in the past three years, both civil and criminal. Since 2012, the Division has at least begun trial in six civil cases and tried ten criminal cases to verdict. Currently, the Division has five civil cases in litigation and nine criminal cases scheduled for trial. Given the size and complexity of the Division's usual investigations and these cases, our experiences with electronic discovery cover a wide range of issues. The discussion below applies to both litigation and investigations.

I. Preservation

a. Avoiding Obstruction of Justice

Preservation is the foundation of successful discovery and litigation, yet issues persist. One of the most concerning trends we have seen at the Division and, more broadly, at the Department, is the intentional destruction of documents and information at the outset of an investigation. In the past six months, the Division obtained two guilty pleas for attempting to obstruct justice. *See* Auto Parts Industry Executive Pleads Guilty to Obstruction of Justice, DEPARTMENT OF JUSTICE (2017), https://www.justice.gov/opa/pr/auto-parts-industry-executive-pleads-guilty-obstruction-justice (last visited Feb 15, 2017); Former Coach USA Inc. Executive Pleads Guilty to Attempting to Obstruct Justice, (2016), https://www.justice.gov/opa/pr/former-coach-usa-inc-executive-pleads-guilty-attempting-obstruct-justice (last visited Feb 15, 2017). In the former case, a Japanese executive of a U.S. auto parts company, just before and during an investigation by the Division, conspired to delete emails, mobile phone data, and other electronic records referring to communications with a competitor. In the second, an executive pled guilty to attempting to destroy back up tapes relevant to a merger investigation and denying the existence of the back up tapes during a deposition. Even more disturbing, the plea agreement between the United States and Volkswagen (VW) details how a VW lawyer alerted certain employees about an impending litigation hold and suggested that certain employees should review their documents, which multiple employees understood to mean delete documents prior to the litigation hold being put into place. *See* Plea Agreement Exhibit 2 Statement of Facts, *U.S. v. Volkswagen*, 16-CR-20394 (E.D. Mich. Jan. 11, 2017), ¶¶73-82. Obviously the consequences of this kind of conduct are far more serious than the more typical discovery mistakes. Counsel may wish to remind their clients, including in-house counsel, of the severe consequences of altering or deleting information, not to mention making false statements to government investigators. Howard Baker's observation that "it is almost always the cover up rather the event that causes trouble" remains no less true today.

b. The Scope and Duty of Preservation

The December 2015 amendments to the Federal Rules of Civil Procedure addressed preservation. Rule 26(f)(3) explicitly requires the parties to address preservation in the meet and confer. Similarly, for a number of years, the Division has included language in its correspondence accompanying documentary requests of all kinds, reminding parties of their preservation obligation at the outset of the investigation. We believe that a party's preservation obligation begins no later than the date on which the company learns of the preliminary investigation. There was at least one investigation in which parties claimed that the preservation obligation did not begin until the Second Request was issued. It is important for counsel to be aware of any company technology initiatives or upgrades that may impact the availability of potentially relevant documents and information. In one case, a merging company terminated a contract for third-party support of a legacy data system, which made the data unavailable. To avoid these circumstances, we encourage parties to discuss preservation with Division staff as early as possible and to do the necessary homework with your client beforehand.

Notwithstanding these preservation demands, the Division is cognizant that preservation of certain kinds of information can be costly, difficult, and occasionally, impossible. *See, e.g., FTC v. DirecTV, Inc.*, 2016 U.S. Dist. Lexis 176873, at *2-6 (N.D. Cal. Dec. 21, 2016) (denying motion for sanctions for failure to preserve a dynamic website). If there is dynamic content or data that is costly to preserve, raise the issue with investigative staff as soon as possible. In certain investigations, this data can be crucial to the analysis of the merger or conduct. Both parties have a common interest in reaching a solution that will allow, for example, economists on both sides to have a valid data set. In cases of disagreement, counsel should be prepared to explain in detail the costs, burdens, or other obstacles to the preservation of the data or information at issue. Judge Andrew Peck of the Southern District of New York often implores parties to "bring your geek to court. . . ."[2] A corollary here might be to have a knowledgeable technical person on the conference call with the Division.

Another aspect of preservation that was at issue in one recently litigated case is whether counsel representing the merging company is covered by the preservation demand. In merger litigation, one of the first requests for production received by the Division is all correspondence with third parties about the

[2] See *Da Silva Moore v. Publicis Groupe*, 287 F.R.D. 182, 193 (S.D.N.Y. 2012).

transaction at issue. Generally, the Division returns the request in its own Rule 34 Request to defendants. In this instance, counsel for one of the defendant's was deposed and he testified that he never preserved his correspondence with third parties about the merger. In response, the Division updated the language in its preservation demand to explicitly require preservation of documents related to the transaction by counsel.

Company employees who are reassigned, move to a new position, or leave the company is another preservation issue that deserves attention from counsel. Counsel needs to have a plan or system to ensure that responsive documents and information are being maintained in these circumstances. *See also* Model Second Request Instruction 5 (requiring the company to include assistants and predecessor employees if custodians are identified).

Finally, the Division is seeing new categories of relevant information in formats and on devices that are difficult to preserve. In the financial industry, broker chats and instant messages can be critical evidence. There have been press reports about the use of messaging apps in at least one criminal antitrust investigation. *See* R. Vandeford, "DOJ antitrust enforcers' uncovered cartel that largely used encrypted chats – an agency first, official says," Mlex Global Antitrust, Feb. 3, 2017, http://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=863735&siteid=191&rdir=1 (last visited 2/16/2017). Counsel would be well served to determine if this type of information needs to be preserved.

II. Meet and Confer

a. Production Format

The Division has developed robust production specifications that have been developed and refined over the years to make the production formats we are seeking as clear as possible. We encourage counsel to make sure that they have the current version of the production specifications because the Division updates them regularly. In the past we have used both ASCII and Unicode production specifications, depending upon the review platform and the characteristics of the documents being sought. While ASCII productions specifications are still being used for some ongoing investigations and cases, the Division is now transitioning to Relativity for all new investigations and cases. As a result, we are moving exclusively to Unicode production specifications.

b. Clawbacks and Rule 502(d)

The challenges of doing an effective and comprehensive review for privileged information in cases or investigations that are as large and complex as a government antitrust investigation are well known. The Division has an internal policy addressing inadvertently produced privileged documents that roughly mirrors the rules of civil procedure. The Division will sequester documents it identifies as privileged and will do the same with potentially privileged documents identified by a producing party. However, we expect the producing party to undertake some remediation when privileged documents are identified. In some investigations, the Division has received almost daily lists of documents identified as inadvertently produced. The process of identifying and sequestering records that have been identified by counsel as privileged is complicated and time consuming for the Division. Staff not only sequesters the identified documents in the review platform, but throughout the investigative team's case files. Therefore, the Division asks that the producing party take affirmative steps to minimize the number of requests. For example, counsel should identify **all** copies of the inadvertently produced documents as well as any related documents that are identified as privileged. Too often it appears that counsel identifies one document at a time and does not look for duplicates or similar documents in the production. Similarly, when the Division identifies potentially privileged documents during its review, we would ask counsel to determine if there are other copies or related potentially privileged documents in the production.

c. Burden

As discussed above with respect to preservation, if a request for production is too burdensome, whether because of cost or time, counsel should be able to support that position with specific facts and costs. We all are familiar with concerns about production costs that diminish as counsel is asked for more details about the specific costs associated with producing a particular set of documents or data.

III. Review, Production, and Using Technology

a. Revised Model Second Request

The Division issued a substantially revised Model Second Request in December 2016. While most of the changes are substantive, some of the changes addressed electronic discovery and production to the Division. The Division

revised the specifications relating to databases and the instructions relating to the use of technology in preparing a response to a Second Request.

1. New e-Discovery Related Definitions

The Division substantially revised the definition of document. The Division removed references to specific kinds of electronic devices because it seems unlikely in the current environment that a producing party would argue that the definition does not include information stored in a particular kind of device. For the first time, the Division has made explicit that the term "document" includes social media accounts such as Facebook and Twitter which are being widely used. The Division also added a definition for Collaborative Work Environments to reflect the wide-spread use of this technology, such as SharePoint. Finally, to facilitate the negotiation of production of data and information from databases, the Division has also added a definition of "data dictionary" to identify the information needed about relevant databases.

2. Specifications and Instructions Relating to Databases and Collaborative Work Environments

Specification 2 of the new Model Second Request identifies the databases that are sought by the Division. The request has been narrowed from the language in former Specifications 10 and 11. This is a straightforward modification that seeks to focus the Division's request for information. Specification 1(f) identifies the technical details about the responsive databases that must be described and is largely the same as the old Model Second Request. Specification 1(g) seeks some basic information about any Collaborative Work Environments that are used by the company. Finally, Instruction 10 makes clear that in whatever format documents or information is produced, the Division must be able to access and use the data. The purpose of this instruction is to prevent a producing party from submitting information in a proprietary format that the Division cannot access, as well as to prohibit the production of enterprise databases that the Division lacks the infrastructure to review. *See, e.g.*, *Pero v. Norfolk Southern Railway, Co.*, 2014 WL 6772619, at *3 (E.D. Tenn. Dec. 1, 2014).

3. Using Technology to Respond to a Second Request

In 2014, the Division began an initiative inviting parties responding to a Second Request to use Technology Assisted Review (TAR) in their production. Numerous parties have taken advantage of this initiative and we believe it is

working effectively for both the Division and the producing party in the majority of investigations. As a result, we have incorporated our TAR requirements into Instruction 4 of the new Model Second Request. Although we believe the initiative has been effective, there are two areas of concern. First, the clear language of the Instruction[3] requires a producing party to discuss the use of TAR, or any other technology, used to identify or eliminate documents for production to the Division **before** using it. All document productions to the Division, especially those made in response to a Second Request, are the result of a multi-step process. The Division wants to understand the process and tools being used to ensure that it is obtaining the documents and information needed for the investigation. By having these discussions and reaching an agreement, at least in part, before the process has begun, the producing party has some assurance that the Division will not require additional steps. Discovery disputes are most easily resolved at the beginning of a production and are most intractable after production has begun.

Another area of concern is the use of a second responsiveness review, conducted after the TAR process has been completed while counsel is reviewing the production for privileged information. One of the main attractions to the Division of producing parties using TAR is that more knowledgeable reviewers are making the judgment about responsiveness to the Second Request. Antitrust investigations, for the most part, do not involve a straightforward legal analysis of an event or disagreement. Therefore, the responsiveness of a category of information may be subtle and not obvious to someone who is not well-versed in the transaction at hand. Moreover, TAR is used because the results of the process are better and more consistent than a manual review. As a result, the Division will not agree to a party conducting essentially a second responsiveness review of the production during the privilege review process.

4. Non-Custodial Information

Consistent with the deployment of document managements systems and collaborative work environments like SharePoint, parties receiving a Second Request should be prepared to discuss non-custodial or shared corporate resources that may contain documents or information responsive to the Second Request. This requirement has been explicitly incorporated into Instruction 5.

[3] Instruction 4 reads: "Before using software or technology (including search terms, predictive coding, de-duplication, or similar technologies) to identify or eliminate documents, data, or information potentially responsive to this Request, the Company must submit a written description of the method(s) used to conduct any part of its search."

5. Protecting Confidentiality

The new Model Second Request also takes note of the increased sensitivity to the risks associated with producing Personally Identifiable Information and Sensitive Health Information. Often, this kind of data is included in the databases that contain information that is responsive to the Second Request. Instruction 7 explicitly asks parties to remove this kind of information from their productions.

b. Sample Productions

The Division strongly encourages all parties making productions to the Division to first send a sample production of the documents and information to ensure that it is in the proper format and can be loaded by the Division. This is another area in which mistakes are costly and time-consuming. Providing a sample production is a simple way to avoid common production problems.

c. Graphical Objects

The increasing use of graphical images (e.g. logos, social media links) can make a production much larger if each of these images is extracted into a separate record. Not only does this make the resulting production larger than necessary, it also increases the cost of processing unnecessarily.

d. FTP Sites

The Division, as a general rule, strongly discourages its staff from accepting productions from file transfer protocols (FTP) sites. The Division prefers the production via physical media because, if any errors or problem in loading occurs, we can quickly identify whether the source of the problem is our loading procedures or the original media. Particularly in merger investigations where time is at a premium, being able to quickly resolve problems is essential.

IV. Candor, Communication, and Cooperation

The Magistrate Judge's opinion in the *FTC v DirecTV Inc*., 2016 U.S. Dist. Lexis 176873, at *15 (N.D.Cal. Dec. 21, 2016), discussed above, contains this language:

> Based on the record before it . . . DIRECTV could have been more forthcoming in its disclosures to the FTC, and/or more proactive in its

> preservation efforts. But the undersigned also finds that the FTC could have been more proactive in its efforts to obtain discovery regarding [ ]testing and website
> analytics.

Id., at *4-5. This paragraph neatly sums up the root cause of almost all discovery disputes today. The breadth of antitrust investigations requires both the Division and the producing party to engage in open and forthright dialog to identify the information necessary to resolve our investigations. Counsel must have enough familiarity with and information about her client's corporate structure to engage in negotiations with Division staff or have someone from the client available who can do so. The Division has made its electronic production letter publicly available since 2009 in an effort to allow counsel to prepare for negotiations with the Division. Effective communication requires not only candor, but also a complete understanding of the technology, platform, or data sources that are the subject of negotiation. There has been much discussion about the duty of competence that is included in the ABA Model Rules.[4] A corollary is that, particularly in antitrust investigations, both the Division and counsel should take as much care in describing and addressing data and technology as they do in discussing complex legal theories. The Division continues to support the Sedona Conference Cooperation Proclamation[5] and believes it is especially important in the context of government investigations where the issues may not be as clear cut as in a contract or tort action. However, the information asymmetry between counsel and Division staff is real, and requires counsel to make sure that she is being clear and is accurately describing the technology or data at issue.

[4] American Bar Association, Center for Professional Responsibility, Rule 1.1, Comment 8 ("To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology,..."). Found at http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_1_competence/comment_on_rule_1_1 html.

[5] 10 Sedona Conf. J. 331 (2009 Supp.).

V. Conclusion

At this point in the evolution of e-discovery, it is probably best for all concerned to "drop the e," and recognize that e-discovery encompasses all discovery. Given the size of its investigations, the Division has been aggressive in promoting the use of technology to reduce the burden and expense of complying with its compulsory process. The Division is open to any suggestions or proposals that would reduce the burden on the producing party while ensuring that the Division receives the documents and information necessary to conduct its investigation.